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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

LYVONNE G. ARCHER,
Staff Sergeant, United States Army,
Petitioner

v.

THE UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

JOHN T. EDWARDS
Colonel, Judge Advocate General's Corps (JAGC)
United States Army
Defense Appellate Division
5611 Columbia Pike
Falls Church, VA 22041
(202) 756-1807
Counsel of Record

and

ERIC T. FRANZEN
Major, JAGC
United States Army

SCOTT A. HANCOCK
Captain, JAGC
United States Army

28 pp

QUESTION PRESENTED*

Whether a prosecution premised solely on urinalysis results establishing the ingestion of an illegal drug, in the absence of evidence that such ingestion was wrongful, and without instructions on permissive inferences or circumstantial evidence, unconstitutionally shifted the burden to the accused to prove that the ingestion of drugs was not wrongful.

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* This question was recently presented to the Court in Tedder v. United States, Docket No. 86-1934, *pet. filed* June 5, 1987. Similar questions have been presented to the Court in the following cases: Hill v. United States, Docket No. 86-1953, Marble v. United States, Docket No. 86-1954, and Cox v. United States, Docket No. 86-1955, *pets. filed* June 8, 1987.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner Lyvonne G. Archer respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals entered in this proceeding.

OPINIONS BELOW

The opinion of the Court of Military Appeals is reported at —— M.J. —— (CMA 1987) (Appendix A). The opinion of the Army Court of Military Review is unpublished, SPCM 21752 (A.C.M.R. 1986) (Appendix B).

JURISDICTION

The judgment of the Court of Military Appeals was entered on May 20, 1987, affirming petitioner's convictions dated June 12, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) (Supp. II 1984).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States provides:

> Amendment V: "No person shall . . . be deprived of life, liberty, or property without due process of law.

The Uniform Code of Military Justice [hereinafter cited as UCMJ], 10 U.S.C. § 801 *et seq* (Supp II, 1984) provides:

> Article 112a:
>
> (a) Any person subject to this chapter who wrongfully uses . . . a substance described in subsection (b) shall be punished as a court-martial may direct.
>
> (b) The substances referred to in subsection (a) are the following:
>
> (1) . . . marijuana and any compound or derivative of any such substance.

The *Manual for Courts-Martial, United States, 1984* [hereinafter cited as *MCM*], Part IV, para. 37, provides:

> (b) Elements.
>
> (2) Wrongful use of controlled substance
>
> (a) That the accused used a controlled substance; and
>
> (b) That the use by the accused was wrongful.

STATEMENT OF THE CASE

At the time immediately proceeding her court-martial, petitioner was a staff sergeant in the United States Army stationed at Fort Bragg, North Carolina. A sample of petitioner's urine was collected during an unan-

nounced company-wide urinalysis inspection[1] conducted on December 18, 1984 (R. 57-71). The samples were delivered to Compuchem Laboratories (Prosecution Exhibit 2). Compuchem Laboratories issued a report showing that the petitioner's urine sample was positive for tetrahydrocannabinol (THC) metabolites (the active ingredient in marijuana) (Prosecution Exhibit 2).[2] At petitioner's court-martial, the government offered the Compuchem Laboratory report and a stipulation that the report was accurate and then rested. The petitioner denied knowingly ingesting marijuana (R. 236). Petitioner presented exceptional character evidence from a first sergeant and a sergeant first class who testified concerning her outstanding duty performance and excellent military character (R. 214-15 and 221-22).

Petitioner also provided a defense based on the theory of passive inhalation. Dr. McBay testified that an individual could passively inhale marijuana smoke and 40 to 42 hours later submit a urine sample that would produce a reading of 39 nanograms of delta-9 THC metabolite per milliliter (approximately the same concentration of metabolite found in appellant's urine sample, Prosecution Exhibit 1 (R. 115-116). Witnesses testified that on Friday, December 14, 1984, they observed petitioner sitting in a room approximately eight by ten feet in dimension for at least six and one-half hours in the company of seven to eight individuals smoking marijuana (R. 151-155, 188-189). On Saturday, December 15, petitioner was again observed in a room for approximately nine

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[1] *See* Mil.R.Evid. 313 (evidence gathered during an inspection may be admissible at courts-martial) and Dep't of the Army Regulation 600-35, Alcohol and Drug Abuse Prevention Control Program, para. 10-1(b) (3 November 1986) (outlining Army policy concerning urinalysis inspections and biochemical testing).

[2] For an extensive review and discussion of drug testing *see generally* Testing For Drug Use in the American Workplace, A Symposium, 11 NOVA Law Review (Winter 1987).

hours with individuals who were smoking marijuana (R. 158-161, 190-193). On Sunday, December 16, petitioner was observed in a mid-sized car for two hours, accompanied by individuals who were constantly smoking marijuana (R. 161-163, 190). The witnesses testified that they did not observe petitioner use marijuana at any time during the weekend of December 14-16, 1984, (R. 149-184 and 187-204).[3]

In rebuttal Dr. Fyfe, an employee of Compuchem Laboratories, the company that produced the urinalysis report (Prosecution Exhibit 1), testified concerning a hypothetical situation similar to the one posed to Dr. McBay and concluded that it was "highly unlikely" that an individual's nanogram level of 39 could be due to passive inhalation (R. 270).

The trial judge instructed the members of the court-martial as follows:

> Now, with regard to that, we talked about, in both cases, there must be "wrongful use," and I want to give you *a specific instruction concerning wrongfulness, which goes to the defense's theory of passive inhalation.* The burden of proof is upon the prosecution to establish that the use of marihunana was wrongful. If the accused, at the time of the alleged offense—and this goes to the Charge, okay; *this is*

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[3] The facts of petitioner's case coincide with laboratory experiments concerning passive inhalation of marijuana smoke. *See* Waterhouse, A Passive Inhalation Study of Cannabis, Reported at American Academy of Forensic Sciences Meeting, Cincinnati, Ohio (Feb. 18, 1983) (two to five individuals placed in a room with dimensions of ten by eleven by seven feet and exposed to marijuana smoke for two hours produced THC metabolite concentrations in urine at levels up to 50 nanograms per milliliter) and Morland, Bugge, Skuterand, Steen, Wethe and Kjeldsen, Cannabinoids in Blood and Urine after Passive Inhalation of Cannabis Smoke, 30 J. Forensic Sci. 997 (1985) (five individuals exposed to marijuana smoke in a small car for 30 minutes produced positive urinalysis results for THC metabolite).

> *the charge concerning the evidence where passive inhalation was received.* If the accused, at the time of the alleged offense *unknowingly inhaled a substance* which produced a postive urine test, she cannot be found guilty of the offense charged, wrongful use of marihuana. Further, the accused's mere presence at the time others are committing a crime, such a smoking marihuana, or failure to prevent commission of the offense, is not sufficient to find her guilty of use of marihuana; nor is the accused's failure to report others sufficient to find her guilty of the use of marihuana. I advise you further that *to find the accused guilty of the offense of use of marihuana, you must find, beyond a reasonable doubt, that the accused knowingly and consciously used marihuana.* Do you understand that?

(R. 344-45) (emphasis added). Defense counsel did not object to these instructions (R. 346). The military judge made no mention of the member's ability to rely on a permissive inference to satisfy the missing element of wrongfulness.

The members of the court-martial found petitioner guilty of one specification of the use of marijuana in violation of Article 112a, UCMJ. She was sentenced to a bad-conduct discharge. The convening authority approved the sentence. The Army Court of Military Review affirmed the findings and sentence, as did the United States Court of Military Appeals.

The issue litigated and considered by the Court of Military Appeals, as a prerequisite to this Court's jurisdiction, was:

> WHETHER THE EVIDENCE IS SUFFICIENT AS A MATTER OF LAW TO PROVE BEYOND A REASONABLE DOUBT APPELLANT'S GUILT OF THE WRONGFUL USE OF MARIJUANA AS CHARGED.

REASONS FOR GRANTING THE WRIT

Appellant submits that the trial judge's lack of instructions and the facts of this case, including the "mystique" of urinalysis,[4] implied to the court-martial members[5] that they could decide this case without any government evidence on the wrongfulness element of the charged offense. Thus the members inferred that they were to rely on a mandatory presumption of wrongfulness which unconstitutionally shifted the burden of proof to the petitioner and required her to prove her innocence.

Assuming *arguendo* that a presumption was not implied, the permissive inference relied upon by the government to satisfy the wrongfulness element of the charge was not rationally connected by common experience and logic to those facts proven by the government. Because the government's reliance on this inference was unjustified, it failed to prove a *prima facie* case and the military judge should have withheld the case from the members.

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[4] Although the accuracy of the urinalysis was not directly challenged in this case, the military has experienced a history of inaccurate or unsupportable results. *See* Waple, Drug Tests: Issues Raised in the Defense of a "Positive" Result, 11 NOVA Law Review (Winter 1987) 752-753 (between April 1982 and November 1983, 52,000 specimens were found to be mishandled by laboratories testing military urinalysis samples and corrective action was required.

[5] Court-martial members act much the same as a civilian jury and are responsible for following the judge's instructions and applying them to the facts of the case. Article 25, UCMJ. In a special court-martial, such as petitioner's case, the court-martial must be composed of at least three members, the concurence of two-thirds of whom is required to render a verdict of guilty. Articles 16 and 52, USMJ. In actuality petitioner's case was decided by five members, three of whom must have concurred in finding her guilty.

Assuming *arguendo* that the government relied on a justifiable permissive inference, the petitioner's denial of knowing or wrongful use of marijuana and testimony supporting a theory of unknowing use rebutted the government's inference of wrongfulness and thus required the government to prove the element of wrongfulness beyond a reasonable doubt. The government failed to provide any evidence on wrongfulness and therefore failed to present a *prima facie* case.

The Court of Military Appeals affirmed petitioner's conviction based in part on its decision in *United States v. Ford*, 23 M.J. 331 (CMA 1987). Petitioner submits that in *Ford*, the court failed to recognize the fundamental constitutional issues present or properly apply this Court's precedent and thereby based its decision on over simplified legal reasoning. Action by this Court is necessary to correct the lower court's misapplication of law and to provide guidance to other courts regarding the permissible use of the chemical analysis of body fluids in relation to inferences, presumptions, and proof beyond a reasonable doubt.

I. THE MILITARY JUDGE'S LACK OF INSTRUCTIONS ON PERMISSIBLE INFERENCES AND CIRCUMSTANTIAL EVIDENCE REASONABLY IMPLIED AN UNLAWFUL MANDATORY PRESUMPTION OF WRONGFULNESS AND THEREBY RELIEVED THE FACT FINDERS OF THEIR DUTY TO FIND GUILT BEYOND A REASONABLE DOUBT ON ALL ELEMENTS OF THE CRIME AND SHIFTED THE BURDEN OF PROOF TO THE PETITIONER.

In *Francis v. Franklin*, 471 U.S. 307 (1985) a judge's instructions which included the statement, "A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted", was found to have created

a mandatory presumption and thereby unconstitutionally relieved the state of its burden of proof on every element of the offense. *Citing Sandstrom v. Montana*, 442 U.S. 510 (1979) (Reasonable juror could have interpreted an instruction which stated that the law presumes a person intends the ordinary consequences of his voluntary acts to mean that it was presumed that the accused intended his acts).[6] In both cases the Court analyzed the context in which the instructions were given and the circumstances of the cases themselves and then related these factors to what a reasonable jury might have concluded. In particular, the Court noted that in *Francis v. Franklin*, 471 U.S. at 323 and 324, the judge's instructions were contradictory to each another. The instruction that a person "is presumed to intend the natural and probable consequences of his acts" is in conflict with the later instruction that "criminal intention may not be presumed." *Id.* The Court explained that in light of such a quandary a reasonable juror could have believed that the instructions required him to presume the element of intent and that the burden of persuasion fell on the accused to show his lack of intent. *Id.* at 325.

In petitioner's case the crime charged involved only two elements. The government was required to prove that petitioner used a controlled substance and that his use was wrongful. Part IV, para. 37(b), *MCM*. The government presented no proof other than a laboratory report. The government's proof tended to show, that at some point prior to the time petitioner provided the urine sample, she had ingested, by undetermined means, some amount of marijuana. Government counsel apparently hoped to show, circumstantially, that because tetrahydrocannabinol metabolites were found in petitioner's urine,

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[6] *See also* In re Winship, 358 U.S. 358, 364 (1970) (government is required by the due process clause to prove each element of an offense beyond a reasonable doubt).

the fact-finders could properly infer that petitioner wrongfully or knowingly used marijuana. The military judge's instructions made no reference to the use of a permissive inference by the finder of fact in order to satisfy the wrongfulness element.

By sending this case to the fact-finders without instructing them on the use of a permissive inference, the military judge and the circumstances of this case implied to the fact-finders that they must presume the missing element of wrongfulness. The fact that the military judge submitted the case to the court conclusively implied that a *prima facie* case existed as to every element of the offense and that the members could decide the case.[7] Because a *prima facie* case as to wrongfulness was not proven and no instructions regarding a permissive inference were given, the fact-finders were, in essence, led to believe that they *must* presume the element of wrongfulness in order to decide the case. Thus once the fact-finders found that petitioner had ingested marijuana they had no recourse but to also find that the ingestion was wrongful.

A presumption which amounts to an impermissible shifting of the burden of persuasion to the accused can not stand. *Leary v. United States*, 395 U.S. 6 (1969) (statute that provides that possession of marijuana is sufficient to sustain a conviction for the knowing possession of illegally imported marijuana unless the accused proves otherwise was unconstitutional); *Tot v. United States*, 319 U.S. 463 (1943) (statute that provides that possession of a weapon or ammunition by an accused con-

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[7] Had the military judge given the proper instructions concerning the use of a permissive inference, the existence of a presumption would not be an issue before the Court. Petitioner submits that it is important for the Court to convey to lower courts that such instructions must be given to avoid creating a presumption of guilt against an accused.

victed of a violent crime presumes that the weapon or ammunition was shipped or transported by interstate or foreign commerce unless the accused proves otherwise was unconstitutional). The government's case involved a superficially impressive laboratory report. Such evidence created the appearance to reasonable fact-finders that the government had proven all elements of the offense. In actuality the laboratory report provided no evidence regarding petitioner's wrongful or knowing ingestion of marijuana.

Petitioner's case is distinguishable from *Barnes v. United States*, 412 U.S. 837 (1973) (common law inference of knowledge that property had been stolen, arising from possession of stolen goods is constitutionally justified). In *Barnes* the evidence established that the accused possessed recently stolen treasury checks payable to unknown individuals. *Id. Barnes* involved a permissive inference and not a presumption. The judge instructed the jury that under certain circumstances an accused's unexplained possession of stolen goods may serve as a basis to infer knowledge that the goods were stolen. *Id.* at 841. The facts and circumstances were held to justify the inference. *Id.* at 846. In petitioner's case the military judge provided no instructions regarding inferences or presumptions concerning the unproven element of wrongfulness. Although the facts and circumstances of petitioner's case may have justified a permissive inference of wrongfulness, they implied to reasonable fact-finder a mandatory presumption of wrongfulness.

II. ASSUMING *ARGUENDO* THAT A PRESUMPTION WAS NOT IMPLIED TO THE MEMBERS, THE PERMISSIVE INFERENCE RELIED ON BY THE GOVERNMENT AND ULTIMATELY THE MEMBERS TO SATISFY THE ELEMENT OF WRONGFUL USE WAS NOT RATIONALLY CONNECTED BY COMMON EXPERIENCE AND LOGIC TO THOSE FACTS PROVEN BY THE GOVERNMENT.

In *Francis v. Franklin*, 471 U.S. 307, the Court explained the use of a permissive inference. A permissive inference does not relieve the government of the burden of proof, but merely allows the jurors to decide if a suggested conclusion may be inferred from those facts proven. *Id.* at 315. In order for the inference to stand, the facts must logically imply the unproven fact by common experience and reason. *Id.* at 315, *citing Ulster County v. Allen*, 442 U.S. 140 (1979) (Instructions that directed jury to consider all circumstances tending to support or contradict inference proposed by state that all four occupants of a vehicle possessed an illegal weapon was permissive rather than mandatory and therefore constitutional).

In petitioner's case the military judge gave no instructions similar to those in *Ulster County*. The fact that petitioner ingested some amount of marijuana thereby causing tetrahydrocannabinal metabolites to be present in her urine, does not logically suggest by common fact and reason that petitioner wrongfully or knowingly used marijuana. The government's rebuttal expert, Dr. Fyfe, admitted on cross examination that an individual could passively consume marijuana and produce positive results on a urinalysis test (R. 283). As presented at trial, other experts are in agreement.

> Marijuana is commonly smoked in social situations in which not all present smoke the drug. It is therefore possible that the nonsmokers could passively inhale enough of the cannabinoids in marijuana smoke . . .

to excrete detectable amounts of metabolic products in their urine.

M. Perez-Reyes, *Passive Inhalation of Marijuana Smoke and Urinary Excretion of Cannabinoids*, 34 Clin. Pharmacol. Ther. 1 (1984) (see R. 283). *See also Eighth Air Force Urinalysis Guide*, 21 Jan. 1985, pp. 17, 18 reprinted in its entirety in *Army Trial Defense Service Memorandum* 85-2, Attachment 8-23 (1 October 1985) (Unknown ingestion has also been found to be a possible means of producing a positive urinalysis result. Marijuana may be baked in brownies, stew or chili. "Normally one is not going to recognize marijuana when ingested if placed in food").

Petitioner's case is similar to those cases where the Court held that the facts proved did not logically support, by common experience and reason, the inference sought to be established. *See Turner v. United States*, 396 U.S. 398 (1970) (statute stating that unexplained possession of cocaine allows inference that accused trafficked in illegally imported narcotics was not justified because cocaine is both imported and produced in United States for legal purposes; and for similar reasons a statute stating that the absence of tax stamps is *prima facie* evidence of violation of another statute prohibiting the trafficking of illegally imported cocaine was not constitutional).[8]

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[8] *See also* Leary v. United States, 395 U.S. 6 (1969) (statute that provided that possession of marijuana was sufficient to sustain conviction for knowing possession of illegally imported marijuana was not a logically supported permissive inference); United States v. Romano, 382 U.S. 136 (1965) (statute that provided that accused's presence at an illegal still created an inference that he owned the still was unconstitutional because there was no connection between the two premises based on common experience); and Tot v. United States, 319 U.S. 463 (1943) (statute that provided that possession of a weapon or ammunition by an ac-

In petitioner's case, the government provided no explanation to the fact-finders why it was more likely than not that petitioner's positive urinalysis results were caused by her wrongful use of marijuana rather than by some other cause.[9] The expert opined that it was "highly unlikely" that in a factual scenario similar to that alleged by petitioner, an individual would produce positive results (R. 270). The expert, however, did agree that an individual could unknowingly consume marijuana and produce positive urinalysis results (R. 236). Petitioner submits that an opinion by a prosecution expert on whether the amount of metabolites in an accused's urine *precluded* the possibility of passive inhalation or ingestion is a reliable and constitutionally acceptable means for proving the offense of the unlawful use of marijuana when detected by urinalysis. *See e.g. United States v. Harper*, 22 M.J. 157 (CMA 1986) (court held that accused's conviction was not based solely on laboratory reports because expert opined that the amount of metabolite in urine as indicated by the report precluded passive use). However, the expert's opinion in this case, that passive inhalation was "highly unlikely" to produce positive results in a hypothetical situation similar to petitoner's, is certainly not proof beyond a reasonable doubt of the element of wrongfulness.

The result of the government's case and the trial judge's instructions, or lack thereof, forced the petitioner

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cused convicted of a violent crime, allowed inference that the weapon or ammunition was transported by interstate or foreign commerce was irrational and illogical because the connection between facts proved and those sought to be inferred was not grounded in common experience).

[9] *Cf.* United States v. Murphy, 23 M.J. 310 (CMA 1987) ("[W]here scientific evidence is relied upon to prove the use of marijuana, the Government may not presume that the judge or members are experts capable of interpreting such evidence").

to rebut an illogical and unsubstantiated inference of wrongfulness. Petitioner's circumstances were not unlike those of the accused in *Mullaney v. Wilbur*, 421 U.S. 684 (1975). In *Mullaney* the judge instructed the jury in a homicide case that malice aforethought was conclusively implied unless the accused proved by a preponderance of evidence that he acted in the heat of passion. The Court held that the government had the burden of proving the accused's intent and when the issue of heat of passion or sudden provocation was properly raised, the government had the burden to disprove this issue and affirmatively prove malice aforethought. *Id.* In petitioner's case, the government should have had the burden of affirmatively proving petitioner's wrongful use by disproving innocent or nonintentional use. *See United States v. Harper*, 22 M.J. at 160. Because the government failed to present evidence on the element of wrongfulness, the military judge erred in not withdrawing the case from the fact-finders.

III. PETITIONER'S DENIAL OF KNOWING USE OF MARIJUANA AND EVIDENCE THAT SHE COULD HAVE UNKNOWINGLY CONSUMED MARIJUANA REBUTTED THE GOVERNMENT'S PERMISSIVE INFERENCE OF WRONGFULNESS AND THUS REQUIRED THE GOVERNMENT TO PRESENT EVIDENCE AND PROVE THE ELEMENT OF WRONGFULNESS.[10]

Even if the government's inference of wrongfulness was logical and properly substantiated, its permissive use was nullified by petitioner's evidence to the contrary. In *Mullaney v. Wilbur*, 421 U.S. 684 (1975), the Court held that an evidentiary inference may be employed to

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[10] A similar issue has been raised before the Court in United States v. Douglas, —— M.J. —— (CMA) cert. pet. filed May 29, 1987 (1987).

satisfy an element unless it is contradicted by other properly presented evidence. Once contradicted, the element must be proven by competent evidence. *Id.* In an apparent attempt to incorporate *Mullaney*, the *Manual for Courts-Martial* provides:

> Possession, use, distribution, introduction, or manufacture of a controlled substance may be inferred to be wrongful in the absence of evidence to the contrary. The burden of going forward with evidence with respect to any such exception in any court-martial or other proceeding under the code shall be upon the person claiming its benefit. If such an issue is raised by the evidence presented, then the burden of proof is upon the United States to establish that the use, possession, distribution, manufacture, or introduction was wrongful.

Part IV, para. 37(c)(5), *MCM*. Petitioner submits that she presented some evidence which contradicted the government's inference of wrongfulness and thus required the government to go forward and present evidence to establish the element of wrongfulness.

As discussed *infra*, petitioner established that an individual may unknowingly consume marijuana, not feel its affects and still produce positive urinalysis results (R. 115-116). Petitioner also denied under oath ever knowingly using marijuana (R. 236). These facts clearly constitute evidence which contradicts the government's inference. However, the court below in *United States v. Ford*, 23 M.J. 331 (CMA 1987) unjustifiably expanded the standard regarding inferences set out in *Mullaney v. Wilbur*, 421 U.S. 684 and Part IV, para. 37(c)(5), *MCM*, by leaving it up to the fact-finders to believe or disbelieve the accused's evidence contradicting the government's inference. *Ford*, 23 M.J. at 336. The lower court explained that the government needed to persuade the fact-finders that the accused's evidence con-

tradicting the inference should be disbelieved. *Id.* at 336.

The lower courts' reasoning is wrong. The holding implicitly shifts the burden of persuasion to the accused to disprove the government's inference. It is clear from *Mullaney v. Wilbur*, 421 U.S. at 702-703 and Part IV, para. 37(c)(5), *MCM*, that only a burden of production shifts to the accused once a permissive inference is established and that a burden of persuasion never shifts to the accused. If the accused can meet his burden of production then the inference becomes unsustainable and the government must produce evidence on this unproven element. Petitioner produced uncontroverted evidence challenging the government's inference; consequently, the military judge should have withheld the case from the fact finders unless the government produced evidence on the missing element of wrongfulness.

CONCLUSION

The lower court's decision in this case represents a misinterpretation and misapplication of constitutional law. The lower court has taken a simplistic view towards complex and fundamental legal issues. Besides affirming the conviction and punishment of a soldier whose guilt was not proven beyond a reasonable doubt, the decision provides erroneous precedent for other courts to follow. Petitioner asks the Court to issue a writ of certiorari to the United States Court of Military Appeals in order to reverse the lower court's decision and issue an opinion from the Court providing guidance to other courts on the constitutional uses of the chemical analysis of body fluids. The government's evidence that passive inhalation was a "highly unlikely" explanation for petitioner's test results is merely rebuttal to petitioner's evidence and does not prove the missing element of wrongfulness. To consider such evidence against petitioner's evidence to

the contrary, changes petitioner's burden from one of production to one of persuasion which is impermissible.

Respectfully submitted,

JOHN T. EDWARDS
Colonel, Judge Advocate
General's Corps (JAGC)
United States Army
Defense Appellate Division
5611 Columbia Pike
Falls Church, VA 22041
(202) 756-1807
Counsel of Record

and

ERIC T. FRANZEN
Major, JAGC
United States Army

SCOTT A. HANCOCK
Captain, JAGC
United States Army

APPENDICES

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 55567/AR
CMR Dkt. No. 21752

UNITED STATES,
Appellee

v.

LYVONNE G. ARCHER (241-94-6888),
Appellants

ORDER

On consideration of the granted issue (24 M.J. 60) in light of *United States v. Ford*, 23 M.J. 331 (C.M.A. 1987), and *United States v. Murphy*, 23 M.J. 310 (C.M.A. 1987), it is, by the Court, this 20th day of May, 1987,

ORDERED:

That the decision of the United States Army Court of Military Review is affirmed.

For the Court,

/s/ John A. Cutts, II
Deputy Clerk of the Court

cc: The Judge Advocate General of the Army
Appellate Defense Council (HANCOCK)
Appellate Government Counsel (HEWITT)

APPENDIX B

UNITED STATES ARMY COURT OF
MILITARY REVIEW

Before
WOLD, FELDER, and NAUGHTON
Appellate Military Judges

SPCM 21752

Fort Bragg

E.M. Urech, Military Judge

UNITED STATES,

Appellee

v.

STAFF SERGEANT LYVONNE G. ARCHER
241-94-6888,
United States Army,

Appellant

For Appellant: Lieutenant Colonel Paul J. Luedtke, JAGC, Major Edwin D. Selby, JAGC, Captain H. Alan Pell, JAGC (on brief).

For Appellee: Colonel James Kucera, JAGC, Lieutenant Colonel Adrian J. Gravelle, JAGG, Lieutenant Colonel Gary F. Roberson, JAGC, Captain Patrick A. Hewitt, JAGC (on brief).

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20 May 1986

DECISION

Per Curiam:

On consideration of the entire record, including consideration of the issues personally specified by the appellant, we hold the findings of guilty and sentence as approved by the convening authority correct in law and fact. Accordingly, those findings of guilty and the sentence are AFFIRMED.

FOR THE COURT:

/s/ William S. Fulton, Jr.
WILLIAM S. FULTON, JR.
Clerk of Court

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